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HARPAL SINGH GREWAL

v.

LEMBAGA TATATERTIB PEGUAM-PEGUAM & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[ORIGINATING MOTION NO: R2-17-17-2007]
10 MAY 2010

C ***LEGAL PROFESSION:*** *Disciplinary proceedings - Complaint - Complaint against advocate and solicitor for misappropriation of client's funds - Settlement reached between solicitor and client - Whether complaint withdrawn - Whether procedure for withdrawal of complaint mandatory - Effect of non-compliance with procedure - Legal Profession (Disciplinary*
D *Proceedings) Rules, r. 7*

LEGAL PROFESSION: *Disciplinary proceedings - Disciplinary Board (DB) - Appeal against decision of DB - Whether DB had made a decision on the merits of the complaint - Whether decision of DB to direct*
E *a formal investigation by Disciplinary Committee is appealable - Legal Profession Act 1976 - Legal Profession Amendment Act 2006*

LEGAL PROFESSION: *Disciplinary proceedings - Disciplinary Board (DB) - Complaint against advocate and solicitor for misappropriation of client's funds - Investigation Tribunal recommending complaint to be*
F *dismissed due to settlement reached between solicitor and client - DB nevertheless constituting a Disciplinary Committee (DC) to investigate the complaint - Whether complaint withdrawn - Whether DB mandatorily obliged to strike out complaint - Whether the DB's decision to constitute a DC was proper - Whether breach of natural justice proven - Legal*
G *Profession Act 1976, ss. 102(2) and 103B - Legal Profession (Disciplinary Proceedings) Rules, r. 7*

LEGAL PROFESSION: *Disciplinary proceedings - Procedure - Appeal against decision of Disciplinary Board to convene a Disciplinary*
H *Committee to investigate complaint - Whether amended appeal procedure under Legal Profession Amendment Act 2006 applicable*

On 25 May 2005, the 2nd respondent lodged a complaint with the Advocates and Solicitors Disciplinary Board ("the DB"). The
I complaint was that the applicant, as a solicitor, had misappropriated RM400,000 belonging to the 2nd respondent. On

20 October 2005, an Investigation Tribunal ("the IT") was appointed by the DB to look into the complaint. The IT in its report dated 5 January 2007 recommended that the Complaint be dismissed because there was a proposal for settlement on terms reached between the applicant and the 2nd respondent. On 9 February 2007, the DB considered the complaint and the recommendations of the IT and decided to constitute a Disciplinary Committee ("DC") to conduct an investigation into the complaint pursuant to ss. 102(2) and 103B of the Legal Profession Act 1976 ("LPA76") ("the DB's Decision"). The appellant claimed that since the complaint had been withdrawn, the Director was mandatorily obliged to comply with r. 7 of the Legal Profession (Disciplinary Proceedings) Rules ("the Rules") and strike out the complaint from the Register. On 9 March 2007, the applicant lodged an appeal by way of a notice of appeal dated 7 March 2007 against the decision of the DB to convene a DC to investigate into the complaint. However, the Legal Profession Amendment Act 2006 ("the Amendment Act") had come into force on 2 October 2006. Pursuant to s. 103E under the Amendment Act, an appeal against the Decision of the DB should be lodged within one month from the date of notification of the DB's Decision and the appeal must be brought by way of an originating motion ("OM"). Hence, the applicant filed an appeal by way of a notice of originating motion dated 26 March 2007 ("the Current Appeal"). The issues that arose for consideration were: (a) whether there was a withdrawal of the complaint; (b) whether the DB's decision to constitute a DC was proper; and (c) whether the Amended Act applied to the appeal.

Held (striking out the OM/Current Appeal with costs):

(1) The word used in r. 7(1) is "may" and not "shall" or "must" and the language is not in the negative form. The provision of withdrawing the complaint is a rather procedural one and no consequence is indicated in the rule for non-compliance of withdrawal in the manner prescribed. For non-compliance of a directory provision, the resultant does not become nullity if substantial compliance is made and no prejudice caused to a party affected by the said decision for such non-compliance. (paras 11-12)

(2) The IT recommended that the complaint be "dismissed". Pursuant to s. 102(2) (b) of the Pre-Amendment LPA, the 1st respondent upon receiving the IT's Report was entitled to disagree with the IT's recommendation and appoint a DC. (paras 22 & 23)

(3) Section 35(1) was not inapplicable to the Current Appeal. What appears from s. 35(1) is that the new s. 103E will apply to all appeals unless they have already been heard before the coming into being of the new s. 103E. It did not matter whether the complaint was lodged before or after the coming into force of the Amendment Act. What mattered was the stage of the appeal when the Amendment Act came into force. The Current Appeal was filed after the Amendment Act came into force on 2 October 2006. (paras 31-33)

(4) The 1st respondent wrote to the applicant to inform him that his appeal could be made under the Amendment Act as s. 35(1) of the Amendment Act was applicable to his case. The applicant duly complied by withdrawing his earlier appeal and filing the Current Appeal. Therefore the applicant had directly or indirectly admitted that the provision of the Amendment Act applied. The principle of estoppel was invoked against the applicant. *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Berhad* (ref'd). (para 41)

(5) Pursuant to s. 103E, an appeal can only be brought against a decision of the DB, if and only if, it is a decision given pursuant to s. 100(5), (8) or (9) or s. 103D of the Amendment Act. The DB had not made a decision on the merits of the factual allegations or matters relating to the complaint. All the DB had done was merely to direct that a formal investigation be conducted by the DC on the complaint against the applicant. There is no provision within the Amendment Act to allow the applicant to lodge an appeal against the decision of the DB to refer the complaint to the DC. Therefore the Current Appeal was incompetent and premature. (para 48)

(6) There was no breach of natural justice as alleged as the applicant was present during the IT proceedings and was given the opportunity to be heard only to have arrived at a "settlement" with the 2nd respondent which led to the IT being informed that the complaint was being "withdrawn". (paras 53 & 54)

Case(s) referred to:

Bhavnagar University v. Palitana Sugar Mill (P) Ltd [2003] (2) SCC 111 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

CIT v. Anjum MH Ghaswalla [2002] (1) SCC 633 ***(refd)***

Dato' Kanagalingam Velupillai v. Majlis Peguam & Anor [2004] 5 CLJ 505 HC ***(refd)***

David Tan Boon Chee v. Medical Council of Singapore [1980] 1 LNS 16 HC ***(refd)***

Jerald Allen Gomez v. Shencourt Sdn Bhd; Majlis Peguam (Intervenor) [2006] 1 CLJ 88 HC ***(refd)***

K Prasad v. Union of India [1988] (Sup) SCO 269 ***(refd)***

Lachmi Narayan v. Union of India AIR [1976] SC 714 ***(refd)***

Lebbey Sdn Bhd v. Tan Keng Hong & Anor [2000] 1 CLJ 136 HC ***(refd)***

Lembaga Tatatertib Peguam-Peguam v. Wan Mohd Nazri Wan Hassan [2007] 2 CLJ 317 FC ***(refd)***

Lim Phin Khian v. Kho Su Ming [1996] 1 CLJ 529 SC ***(refd)***

Malaysian Bar v. Dato' Kanagalingam Veluppillai [2004] 4 CLJ 194 FC ***(refd)***

Nasir Ahmad v. Emperor AIR [1936] Privy Council 253 ***(refd)***

PP v. Chew Siew Luan [1982] CLJ (Rep) 354; [1982] CLJ (Rep) 285 FC ***(refd)***

Rohana Ariffin & Anor v. Universiti Sains Malaysia & Another Case [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390 HC ***(refd)***

Wong Keng Leong Royney v. Law Society of Singapore [2006] SGHC 179 ***(refd)***

Yusuf Jumabhoy v. The Law Society of Singapore [1988] 1 LNS 136 HC ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 100(5), (8), (9), 101(1), 102(1), (2)(b), (3), 103(1), 103B, 103D, 103E(1), (4)

Legal Profession Amendment Act 2006, ss. 35(1), (2), (3)

Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, rr. 7(1), 8, 17

Legal Profession Act [Sing], s. 88(2)

Other source(s) referred to:

NS Bindra's Interpretation of Statute, 8th edn, pp 768-769

For the applicant - Jasvinjit Singh; M/s AJ Ariffin, Yeoh & Harpal
For the 1st respondent - CN Tan; M/s Hishamuddin Allen & Gledhill
2nd respondent - Not represented

Reported by Amutha Suppayah

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JUDGMENT

Mohd Zawawi Salleh J:

The Relief Sought By Applicant

B **[1]** By originating motion ("OM") dated 26 March 2007 (encl. 1), the applicant seeks the following relief:

(a) that the decision of the 1st respondent dated 9 February 2007 referring the withdrawn complaint by the 2nd
C respondent dated 25 May 2005 to the disciplinary committee for formal investigation pursuant to s. 102(2) and 103B of the Legal Profession Act 1976 be set aside;

(b) a declaration that the 1st respondent was obliged pursuant to r. 7 of the Legal Profession (Disciplinary Proceedings)
D (Investigating Tribunal and Disciplinary Committee) Rules 1994 ("the Rules") to strike out the said withdrawn complaint from the Complaints Register;

(c) a declaration that the Disciplinary Proceedings against the
E applicant are governed by the Legal Profession Act 1976 applicable immediately before the coming into operation of the Legal Profession (Amendment) Act 2006;

(d) pending the final disposal of this motion, all proceedings
F pursuant to the order of the 1st respondent of 9 February 2007 be stayed.

[2] After considering the submissions filed by both parties, the court struck out the OM with costs.

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Procedural History

[3] In order to understand the issues which give rise to this application it is necessary to state briefly the procedural history of the case:

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(a) On 25 May 2005, the 2nd respondent lodged a complaint with the Advocates and Solicitors Disciplinary Board ("the DB"). The complaint bore the number IT/05/0888 ("the complaint"). In the complaint, the 2nd respondent alleged that
I on 18 January 1994 a sum of RM400,000 had been gifted to him by a businessman for the purpose of discharging his

bankruptcy, but the applicant who was the 2nd respondent's solicitor at that time, used the RM400,000 for his own personal gain and until today has failed to account for the money.

(b) On 20 October 2005, an Investigation Tribunal ("the IT") was appointed by the DB to look into the complaint. The IT hearing commenced on 28 March 2006 and carried through on 29 March 2006, 12 October 2006, 13 October 2006, 16 October 2006, 17 October 2006, 18 December 2006, 19 December 2006 and 20 December 2006. The IT was chaired by Mr Clement G Lopez and two (2) other gentlemen, namely Mr Loh Siew Hock and Mr Ng Goon Fong.

(c) By a report dated 5 January 2007, the IT then recommended that the complaint be dismissed because there was a proposal for settlement on terms reached between the applicant and the 2nd respondent.

(d) On 9 February 2007, the DB considered the complaint and the recommendations of the IT and decided to constitute a disciplinary committee to conduct an investigation into the complaint pursuant to s. 102(2) and s. 103B of the LPA 1976 ("the DB's Decision").

(e) On 6 March 2007, the applicant informed the DB and the Director of the Complaints Secretariat that since the complaint had been withdrawn, the Director is mandatorily obliged to comply with r. 7 of the Legal Profession (Disciplinary Proceedings) Rules and strike out the complaint from the Register.

(f) On 9 March 2007, the applicant lodged an appeal by way of a notice of appeal dated 7 March 2007 against the decision of the DB to convene a disciplinary committee to investigate into the complaint.

(g) On 12 March 2007, the DB wrote to the applicant and put him on notice that the Legal Profession Amendment Act 2006 ("the Amended Act") had come into force on 2 October 2006 and that pursuant to s. 103E the Amended Act read together with the Saving and Transitional Provision in s. 35 of the Legal Profession (Amendment) Act 2006:

A (a) an appeal against the decision of the DB should be lodge within one month from the date of notification of the DB's Decision (that was received by the applicant on 23 February 2007); and

B (b) the appeal against the DB's Decision should have been brought by way of an originating motion setting out the grounds of appeal pursuant to s. 103E(1) and (4) of the Amended Act.

C (h) On 22 March 2007, the applicant wrote to the DB to express his concerns regarding the effect of the amendments to the Legal Profession Act. The applicant recognized that he did not have a right to appeal the decision of the DB in the said letter. Nevertheless, the applicant filed an appeal by way of a notice of originating motion dated 26 March 2007 in encl. 1 D ("the Current Appeal"). Therefore the appeal was officially lodged on 26 March 2007.

[4] At the outset, the court wishes to emphasize that the court is not concerned with the substantive merits of the 2nd E respondent's case against the applicant.

The Issues

[5] The issues that arise for consideration are as follows:

F (a) whether there was a withdrawal of the complaint;

(b) whether the disciplinary board's decision to constitute a disciplinary committee is proper; and

G (c) whether the amended LPA applies to the current appeal.

Discussion On Issue (a)

[6] The applicant submits that on 20 December 2006, midway through the investigation by the IT, the 2nd respondent withdrew H the complaint. According to the applicant, the withdrawal is evidenced by the notes of proceedings before the IT as follows:

(a) At p. 10 of encl. 2, under the heading "Report of the Investigating Tribunal", it was stated that:

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> The Tribunal noted that the Complainant and the Respondent had reached an amicable settlement, by virtue of which this Complaint was withdrawn without any liberty to the afresh ...

(b) At p. 18 of encl. 2, from para. (a) onwards, it was patently clear that: A

(a) The IT did not complete its investigations;

(b) The investigation were terminated when counsel for the complainant withdrew the complaint at the hearing on 20 December 2006. B

(c) At the time of the withdrawal, the complainant had not closed its case. The complainant's witness, Mr. Leong Tuck Onn, was being cross-examined by the respondent when the complainant's counsel withdrew the complaint. The respondent had not yet been called upon to give his explanation. In view of the withdrawal, the respondent was not called upon to explain. C

D

(d) The recommendation made by the IT was solely based on the withdrawal, and not based on a consideration of the evidence before it.

(e) It was the understanding of the IT that the complaint would be struck out on the basis that it was withdrawn. E

(c) At p. 16 of the applicant's 2nd affidavit, it was stated that:

> Dato Dominic: Through the intervention of Mr Leong Tuck Onn, the Complainant withdraws this Complaint and all other pending complaints without liberty to file afresh. F

Further down the page, the Chairman records as follows:

> The Panel records its appreciation to Mr. Leong Tuck Onn for successfully intervening towards resolving this matter and to Counsel and all parties for their cooperation. Panel will recommend the dismissal of this Complaint without liberty to this afresh. G

[7] The appellant further submits that from the above records of the investigation proceedings of the IT, it is clear that the complaint was withdrawn unequivocally and the proceedings before the IT were then terminated without any finding being made. H

[8] The 1st respondent holds a contrary view. According to the 1st respondent, it is incorrect for the appellant to refer to the 2nd respondent's complaint as a "withdrawn complaint", the reason I

being that there was never any withdrawal by the complainant. According to the 1st respondent, whichever way one chooses to read r. 7(1), it cannot be read to mean that a person other than the complainant may withdraw the complaint (by addressing it to IT instead of the Director of the disciplinary board).

Findings As Regards To Issue (a)

[9] With respect, the court cannot agree with the submission of the 1st respondent. Rule 7 of the Rules is quoted below:

> 7. Withdrawal of complaints
>
> (1) A complainant may at any time, by letter addressed to the Director, withdraw his complaint.
>
> (2) Upon receipt of a letter withdrawal under subrule (1), the Director shall forthwith inform the chairman of the Disciplinary Board and the Secretary of the Bar Council in writing of the withdrawal of the complaint enclosing a copy of the letter of withdrawal.
>
> (3) Subject to rule 8, the Director shall strike out the withdrawn complaint from the Complaints Register.

[10] From a plain reading of this provision, it is apparent that the rule is procedural one where it prescribes the procedure for a complainant to withdraw the complaint. It is settled law that if a particular statutory provision is a procedural one, even the use of the word "shall" in such provision will not make it mandatory unless consequence of disobedience has been indicated in the statute. In the case of *Lachmi Narayan v. Union of India* reported in AIR [1976] SC 714, the Supreme Court of India pointed out some of cases where the provision must be held to be mandatory. Those are enumerated below in the exact language of the court:

> The primary key to the problem whether a statutory provision is mandatory or directory is the intention of the law-maker as expressed in the law, itself. The reason behind the provision may be a further aid to the ascertainment of that intention. If the legislative intent is expressed clearly and strongly in imperative words, such as the use of 'must' instead of "shall", that will itself be sufficient to hold the provision to be mandatory, and it will not be necessary to pursue the enquiry further. If the provision is couched in prohibitive or negative language, it can rarely be directory, the use of peremptory language in a negative form is

per se indicative of the intent that the provision is to be mandatory (Crawford, the *Construction of Statutes* pp. 523-524). Here the language of sub-section (2) of section 6 is emphatically prohibitive, it commands the Government in unambiguous negative terms that the period of the requisite notice must not be less than three months.

[11] In this instant case, the word used in r. 7(1) is "may" and not "shall" or "must" and the language also not in the negative form. The provision of withdrawing the complaint is a rather procedural one and no consequence is indicated in the rule for non-compliance of withdrawal in the manner prescribed.

[12] For violation of the mandatory provisions of statute, the result of the actions taken becomes a nullity but for non-compliance of a directory provision, the resultant does not become nullity if substantial compliance is made and no prejudice caused to a party affected by the said decision for such non-compliance. (For cases on violation of the mandatory provisions of a statute, see *Nasir Ahmad v. Emperor* AIR [1936] Privy Council 253; *K. Prasad v. Union of India* [1988] (Sup) SCO 269, para. 24; *CIT v. Anjum M.H Ghaswalla* [2002] (1) SCC 633; *Bhavnagar University v. Palitana Sugar Mill (P) Ltd* [2003] (2) SCC 111).

Discussion On Issue (b)

[13] The applicant devoted a large portion of his written submission on this issue. The applicant alleged that the DB had failed to comply with the mandatory requirements of s. 102(3) of the LPA as un-amended and inform the applicant the manner in which it has determined the complaint. According to the applicant, s. 101(1) of the LPA mandatorily requires the IT to provide a report on conclusion of the proceedings. By r. 17 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, the report shall state the findings of fact and recommendation of the IT.

[14] According to the applicant, due to the failure on the part of the DB to comply with s. 101(1) and s. 102(3) of LPA, he was not be able to ascertain "the manner in which the 1st respondent determined the complaint". In the circumstances, in making its decision to convince a DC, the 1st respondent had acted *ultra vires* the Act and this decision must therefore be set aside.

[15] The applicant further submits that the IT's Report was not in accordance with statutory form which requires it to address what could be paraphrased as "the merits" of the complaint and state one of the recommendations required under the Act. The applicant posits that IT's Report could not comply with the statutory requirement as its investigation had not been completed as a result of the withdrawal.

[16] To support his submission, the applicant cited the following cases:

(i) *Yusuf Jumabhoy v. The Law Society of Singapore* [1988] 1 LNS 136; [1988] 1 MLJ 491; and

(ii) *Rohana bte Ariffin & Anor v. Universiti Sains Malaysia & Another Case* [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390.

[17] The 1st respondent submits that there is nothing in this instant case to show that the 1st respondent had acted *ultra vires* the Act when exercising the power conferred under s. 102(2)(b) of the Pre-Amendment LPA.

Findings As Regards To Issue (b)

[18] After considering this issue carefully, the court is of the considered opinion that the applicant's submission is without merit for the following reasons:

(a) Based on the 1st respondent's letter dated 5 March 2007 (para. 3 thereof), it appears that the minutes of meeting of the board meeting on 9 February 2007 had in fact been forwarded to the applicant together with the letter (please see exh. "HSG3" of the applicant's supporting affidavit).

(b) There is no s. 102 in the Amended LPA as s. 102 of the Legal Profession Act 1976 (pre-amendment) ("the Pre-Amendment LPA") was deleted by the Amendment Act. Therefore, the section is no longer applicable and the 1st respondent is not required to furnish any written reasons to the applicant. Furthermore, the applicant has filed the OM herein under the Amended LPA. Therefore, he cannot be relying on the provisions of the Pre-Amendment LPA to support his submission.

(c) If, for the sake of argument, the Pre-Amendment LPA is applicable in this instant case, s. 102(3) of the Pre-Amendment LPA only requires the 1st respondent to furnish the applicant with its reasons in writing in the event that it decided that a formal investigation is unnecessary and after the applicant makes a request for such reasons to be furnished to him. In this instant case, the 1st respondent in fact had decided that a formal investigation is necessary. Also, the applicant failed to aver or show that the applicant had requested the 1st respondent to furnish him with reasons for its decision and the 1st respondent had refused to do so.

[19] The case of *Yusuf Jumabhoy v. The Law Society of Singapore (supra)* does not support the applicant's submission. Firstly, the *Yusuf Jumabhoy* case is a Singapore case. Section 88(2) of the Singapore Legal Profession Act is not reproduced in that case and there is nothing to show whether it is in *pari materia* with s. 102(3) of the Pre-Amendment LPA. Secondly, according to the learned Judicial Commissioner in the *Yusuf Jumabhoy*'s case, "the expression "reason" means the grounds of explanation for the decision of the Council". Therefore, it is reasonable to interpret the words "the manner in which it has determined the application or complaint" in s. 102(3) of the Pre-Amendment LPA as referring to the decision of the 1st respondent and not the reasons themselves. If the applicant wishes to be provided with the reasons for the 1st respondent's decision, he must make a request for such reasons to be furnished.

[20] As to the other case cited by the applicant in support of his submissions ie, *Rohana bte Ariffin v. Universiti Sains Malaysia (supra)*, that case does not concern the interpretation of s. 102(3) of the Pre-Amendment LPA nor any similar provisions and not relevant to the instant case.

[21] In para. 45 of the applicant's submissions, the applicant submitted that since the IT's Report "is outside the purview of the LPA, the 1st respondent therefore cannot act on such a report in convening a disciplinary committee". In para. 51, the applicant submitted that the 1st respondent "acted *ultra vires* when it considered an incomplete and incompetent report" by the IT in coming to its decision.

[22] In this instant case, it is clear that instead of making one of three recommendations listed in s. 102(1) of the Pre-Amendment LPA ie,:

A (a) that a formal investigation is not necessary;

(b) that no cause of sufficient gravity exists for a formal investigation but that the advocate and solicitor should be ordered to pay a penalty; or

B (c) that there should be a formal investigation by a disciplinary committee,

the IT purported to recommend in the IT's Report that the complaint be "dismissed" (please see exh. HSG3 (p. 11) to the C appellant's supporting affidavit).

[23] Pursuant to s. 102(2)(b) of the Pre-Amendment LPA, the 1st respondent upon receiving the IT's Report was entitled to disagree with the IT's recommendation and appoint a DC. In the D case of *Lembaga Tatatertib Peguam-Peguam v. Wan Mohd Nazri bin Wan Hassan* [2007] 2 CLJ 317 the court held that the DB is vested with an independent and distinct power to appoint a DC and this discretion is an absolute discretion. Further, r. 8 of the Rules clearly provides:

E 8. Bar Council or State Bar Committee may proceed with complaint.

(1) Notwithstanding the withdrawal of a complaint under rule 7 and without prejudice to its right to make a complaint of its own F motion, the Bar Council or a State Bar Committee may, if it considers there is merit in the complaint, intervene and proceed with the complaint as if it was made of its own motion.

[24] In addition, if it is true that the IT's Report is "outside the purview of the LPA" as alleged by the applicant, then all the more G the 1st respondent should disagree with the IT's recommendation and appoint a DC to investigate the complaint.

[25] Based on the above reason, the court holds that there is no breach of the fundamental rules of natural justice as alleged by the H applicant. The facts in the cases of *Jerald Allen Gomez v. Shencourt Sdn Bhd; Majlis Peguam (Intervenor)* [2006] 1 CLJ 88; *Malaysian Bar v. Dato' Kanagalingam Veluppillai* [2004] 4 CLJ 194 and *David Tan Boon Chee v. Medical Council of Singapore* [1980] 1 LNS 16 which are relied on by the applicant are obviously different from I the facts of the Current Appeal and can be easily distinguished.

Discussion On Issue (c)

[26] The applicant submits that the Amended LPA does not apply to this instant case. The application set out the following chronology of events leading up to these issues:

(a) 25-5-2005 – Complaint lodged (un-amended Act applied).

(b) 2-10-2006 – LPA Amendment Act comes into force.

(c) 20-12-2006 – Complaint withdrawn.

(d) 22-2-2007 – 1st respondent decides to constitute DC.

[27] According to the applicant, s. 35(1) of the Amended Act only applies to pending appeals, appeals in the course of being heard or otherwise heard but no order or decision had been made at the time the Amended Act came into force. As such, s. 35(1) is inapplicable. Section 35(2) provides that disciplinary proceedings pending before the board shall continue under the un-amended Act. Section 35(3) provides that any complaint concerning the advocate and solicitor referred to the board before the Amended Act shall be "dealt with" under the pre-amended Act.

[28] The applicant further submits that although by the time the appeal was lodged, the amended s. 103E (1) comes into force, it matter not one naught as the right to appeal become vested in the appellant at the time of the 2nd respondent commenced proceeding against the appellant before the disciplinary board. Thus, the appellant is entitled to appeal.

[29] The 1st respondent submits that the Amended Act applies in this case by virtue of P.U. (B) 248/2006 dated 26 September 2006 which states that the Amended Act comes into operation on 2 October 2006.

Findings As Regards To Issue (c)

[30] It should be recalled that the applicant initially filed an appeal by way of notice of appeal on 9 March 2007 ("the first appeal"). Subsequently, on 22 March 2007, the 1st respondent wrote to the applicant to inform him that his appeal should be made under the Amended LPA as s. 35(1) of the Amendment Act is applicable to his case. On 26 March 2007, the applicant filed the Current Appeal. By the applicant's own conduct of withdrawing the first appeal and filing the Current Appeal, he has acknowledged that the Amended LPA applies.

[31] The proceedings in this instant case has come to the appeal stage. Now, the issue is whether the applicant is entitled to file this appeal in view of s. 35(1) of the Amendment Act. With respect, it wrong for the appellant to submit that s. 35(1) is inapplicable to the Current Appeal. In regards to s. 35(2) and s. 35(3) of the Amendment Act, these section do not apply to cases involving appeals because these sections deal with "disciplinary proceedings which were pending before the disciplinary board" at the date of coming into operation of the Amendment Act and any "complaint ... referred to the disciplinary board before the date of coming into operation of (the Amendment Act)" respectively.

[32] Section 35(1) is the section that deals with appeals and is therefore the guide for us to determine whether a particular appeal is to be decided under the provisions of the Pre-Amendment LPA or the Amended LPA.

[33] Section 35(1) of the Amendment Act provides that where on the date of coming into force of the Amendment Act ie, on 2 October 2006:

- appeal under s. 103E were pending before the High Court ... the proceedings shall be continued under and in conformity with the provisions of s. 103E as amended by the Amendment Act; and

- any appeal was in the course of being heard, or had been heard but no order or decision had been made on the appeal, the proceedings shall continue under the provisions of the principal Act applicable to those proceedings immediately before the date of coming into operation of the Amendment Act.

[34] So, what appears from s. 35(1) is that the new s. 103E will apply to all appeals unless they have already been heard before the coming into being of the new s. 103E.

[35] Before proceeding further, it should be noted that it does not matter whether the complaint was lodged before or after the coming into force of the Amendment Act. What matter is the stage of the appeal when the Amendment Act came into force. In regards to the Current Appeal, it was only filed after the

Amendment Act came into force on 2 October 2006. Since the Amendment LPA applies to appeals pending before the High Court on 2 October 2006, it must definitely apply to appeals which are filed after that date because by then the Amendment Act had already came into operation and the court must apply statutes which has already came into force.

[36] The reason why appeals which have already in the course of being heard or having been heard but no order or decision had been made are covered by the Pre-Amendment Act is that such appeals had already reached an advanced stage and not merely pending before the High Court as at 2 October 2006. For appeals which are already pending before the High Court as at 2 October 2006 or filed only after 2 October 2006, the Amended LPA applies.

[37] The 1st respondent's letter to the applicant 22 March 2007 clearly states that s. 35(1) of the Amendment Act applies to the Current Appeal. A circular from the Chief Judge of Malaya (No. 1/2006) was enclosed (please see Tab 5 of the Ikatan Authoriti Responden Pertama). Clearly, what matters is the stage of the appeal (not pending disciplinary proceedings or complaint).

[38] The applicant's submission in regards to s. 103E cannot hold water because the Current Appeal was filed after the date s. 103E of the Amended LPA came into operation and therefore it goes without saying that the provisions of the Amended LPA applies.

[39] Concerning "retrospective operation" of the statute, *N.S. Bindra's Interpretation of Statute*, 8th edn, had this to say at pp. 768-769:

> The question whether a statute operates prospectively or retrospectively is one of legislative intent. If the terms of a statute are clear and unambiguous and it is manifest that the Legislature intended the Act to operate retrospectively make the intention certain or clear, the statute will be presumed to operate prospectively, where it is in derogation of a common law right, or where the effect of giving it a retrospective operation would be to interfere with an existing contract, destroy a vested right or create a new liability in connection with a past transaction or invalidate a defence which was good when the statute was passed.
>
> ...

A Every legislation is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective operation. This rule of interpretation is applicable for the purpose of interpreting the Constitution also.

B **[40]** Cases such as *Rohana bte Ariffin v. Universiti Sains Malaysia (supra)* and *Lim Phin Khian v. Kho Su Ming* [1996] 1 CLJ 529 which are referred to by the applicant are irrelevant as these cases do not deal with the LPA but other statutory provisions (such as the Courts of Judicature (Amendment) Act 1995) or the general law. It is trite law that where a special provision is made in a C special statute, that special provision excludes the operation of a general provision in the general law *(generalibus specialia derogant)* (see the Federal Court case of *Public Prosecutor v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285). In any event, as the facts and issues in the cases referred to by the applicant are D different, the cases must be distinguished (see the case of *Lebbey Sdn Bhd v. Tan Keng Hong & Anor* [2000] 1 CLJ 136).

[41] Based on the above reasons, it is clear that the applicable provisions in the applicant's case are the provisions of the E Amended LPA. The 1st respondent was right in stating that the applicant's appeal shall be made pursuant to the Amended LPA. It is appropriate to mention here that on 22 March 2007, the 1st respondent wrote to the applicant to inform him that his appeal could be made under the Amended LPA as s. 35(1) of the F Amendment Act is applicable to his case. The applicant duly complied by withdrawing the first appeal and filing the Current Appeal. Therefore the applicant has directly or indirectly admitted that the provision of the Amended LPA apply in this case. The principle of estoppels as explained in the case of *Boustead Trading* G *(1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 should be invoked against the applicant.

[42] However, that is not the end of the matter. The 2nd respondent submits that the applicant has no right of appeal as H the complaint has yet to be formally investigated by the DC and DB made no decision on any recommendation by the DC. The 1st respondent in deciding to constitute a DC did not make any decision or final decision on the merits of the complaint. Therefore, there is no decision for the applicant to appeal against.

I

[43] The applicant has contended that he would be prejudiced if the 1st respondent makes a decision to constitute a DC without the IT having heard his defence. The applicant also submitted that the IT's Report was "incomplete and void" as "the applicant had not given his evidence and further the IT had not heard all the evidence and submissions in view of the withdrawal of the complaint at the stage of the complainant's case" and that the 1st respondent had "perpetrated a breach of natural justice" in giving the consideration to the IT's Report (para. 61; please see also paras 77 to 78 of applicant's written submission).

[44] In response, the 1st respondent submits that in actual fact the proceedings before the IT is not formal but is held solely for the purpose of determining whether there is a *prima facie* case which calls for a formal investigation by a DC. It is only at the DC stage that formal investigations are conducted.

[45] According to 1st respondent, if the disciplinary proceedings is allowed to proceed at the DC stage and the DC completes its investigations and presents its recommendation to the 1st respondent after receiving the DC's Committee's recommendation, the applicant has a right to appeal to the High Court within one month from the receipt of the notification of the decision (see s. 103E of the Amended LPA). Thus, the applicant has not been deprived of his right of appeal to the High Court but he must do so at the appropriate stage. In this case, the applicant has filed this appeal to this court without waiting for the DC to complete its investigation.

[46] Before proceeding further, perhaps it would appropriate at this juncture to comment on the functions of the IT. The court agrees with the submission of the 1st respondent that the IT would be performing a "filtering" or "sifting" function in order to ensure that less serious, trivial or frivolous cases are not referred to DC for formal investigation. Put simply, the IT acts as a "filter" of sorts, thereby ensuring that only the most serious complaints are referred to the DB. The Bar Council receives a lot of complaints a year. A number of them are without substance and are sifted by the IT, while the remainder goes to DB for a full investigation or inquiry. If the IT is not to sift, the case load on DB will more than double. Doubling the case load of the DB will create a serious strain on scare resources and slow down the disciplinary process.

A **Whether The Current Appeal Is Premature**

[47] Section 103E reads as follows:

> (1) Any party aggrieved by any decision or order made by the disciplinary board under subsection 100(5), (8) or (9) or section 103D shall have the right to appeal to the High Court within one month of the receipt of the notification of the decision or order complained against; and no appeal shall lie against any other decision or order made by the disciplinary board.
>
> (2) There shall be no judicial review against any decision or order made by the disciplinary board.
>
> (3) The appeal shall be fixed for hearing before a single Judge of the High Court.
>
> (4) The appeal shall be by way of an originating motion setting out the ground of appeal supported by affidavit.
>
> (5) Any appeal against the decision of the High Court shall lie to the Court of Appeal and thereafter to the Federal Court.
>
> (6) The Bar Council may in its discretion intervene at any stage of any appeal under this section.
>
> (7) The disciplinary board shall not be cited as a party in any appeal under this section.
>
> (8) The disciplinary board shall have the right to appear in and address any High Court, the Court of Appeal or the Federal Court hearing any appeal under this section by an advocate and solicitor whether or not the advocate and solicitor is a member of the disciplinary board or the Bar Council.

[48] It is clear that pursuant to s. 103E, an appeal can only be brought against a decision of the DB, if and only if, it is a decision given pursuant to s. 100(5), (8) or (9) or s. 103D of the Amendment Act. Having regard to the decision in the *V.K. Lingam Cases* (see [2004] 5 CLJ 505 and [2004] 4 CLJ 194), the court is not going to suggest that the applicant is not to be characterized as "party aggrieved" within the meaning of s. 103E of the Act (whether post or pre-amendment). What is however quite clear from the fact pattern is that the DB has made no decision on the merits of the factual allegations or matters relating to the complaint. All the DB has done is merely to direct that a formal

investigation be conducted by the DC on the complaint against the applicant. (See the case of *Wong Keng Leong Royney v. Law Society of Singapore* [2006] SGHC 179).

[49] Section 100(5) provides that:

> Where the Disciplinary Board is satisfied that there is no merit in the application or complaint under subsection (2) or (3), the Disciplinary Board shall dismiss the application or complaint and notify the complainant and the advocate and solicitor of its decision.
>
> The Disciplinary Board may impose any one of the follow:
>
> (a) the recording of a reprimand or censure against the name of the advocate and solicitor;
>
> (b) imposition of a fine upon the advocate and solicitor for such sum as the Disciplinary Board deems just;
>
> (c) suspension of the advocate and solicitor from practice for such period not exceeding five years as the Disciplinary Board deems appropriate in the circumstances; or
>
> (d) striking the advocate and solicitor off the Roll.

[50] Section 100(9) provides that:

> The imposition of a penalty or punishment shall not preclude the Disciplinary Board from making an order of restitution of any sum found due and owing to the complaint and stipulating the time within which such restitution ought to be made, failing which the Disciplinary Board may impose on the advocate and solicitor a higher punishment than that previously imposed.

[51] Section 103D provides that:

> (1) After consideration of the report of the Disciplinary Committee, the Disciplinary Board may make an order affirming or rejecting the finding or recommendation of the Disciplinary Committee.
>
> (2) The Disciplinary Board may in appropriate cases impose a greater punishment than that recommended by the Disciplinary Committee.
>
> (3) Where the Disciplinary Board does not agree with the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall make such other order as it deems just.

A (4) Before the Disciplinary Board makes an order under subsection (2) or any order that is likely to be adverse against an advocate and solicitor under subsection (3), it shall notify the advocate and solicitor of its intention to do so and give him a reasonable opportunity to be heard.

B (5) Where the Disciplinary Board makes an order that the advocate and solicitor should make restitution to the complainant of any sum found due and owing to the complainant, it may stipulate the time within which such restitution ought to be made, failing which the Disciplinary C Board may impose on the advocate and solicitor a higher punishment that that previously imposed.

(6) A sum ordered by the Disciplinary Board under subsection (5) to be restituted may be recovered by the complainant as a civil debt.

D **[52]** As can be seen above, there is clearly no provision within the Amended Act to allow the applicant to lodge an appeal against the decision of the DB to refer the complaint to the DC and therefore the current appeal is incompetent and premature.

E **[53]** Further, there was no breach of natural justice as alleged as the applicant was present during the IT proceedings and was given the opportunity to be heard only to have arrived at a "settlement" with the 2nd respondent which led to the IT being informed that the complaint was being "withdrawn".

F

Conclusion

[54] For the reasons set out above, I would strike out the OM/ Current Appeal with costs.

G

H

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